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**November 21, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Case: Worker Appeal

Date of Filing: July 22, 2003

Case No.: TIA-0028

XXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant's late husband, XXXXXXXXXXXX (the worker), was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent physician panel, which determined that the worker's illnesses were not related to his work at DOE. The OWA accepted the panel's determination, and the applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA).

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by

the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a website that provides extensive information concerning the program.^{1/}

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.^{2/}

The worker in this case filed applications with both the DOE and DOL programs. The worker died of prostate cancer during the pendency of his applications. His wife, as his survivor, became the applicant.

The DOE application claimed the following illnesses: prostate cancer, bone, and lymph node cancer, heart disease (3 heart attacks & 7 heart bypasses), major depression, sleep apnea, and hypertension. The application claimed that those illnesses were related to exposures to toxic substances at DOE.

In its determination, the physician panel considered each of the claimed illnesses. The physician panel stated that the worker had the illness, and the physician panel identified the approximate date of onset. The physician panel did not find that the illness was related to exposure to a toxic substance at DOE. Instead, the physician panel found that there was insufficient information to

^{1/} *See* www.dol.gov/esa.

^{2/} *See* www.eh.doe.gov/advocacy.

support a conclusion that exposures aggravated, contributed to, or caused the illness.

With respect to the claimed cancers, the physician panel stated that prostate cancer was the primary cancer and that the other two cancers were the result of metastatic spread. For prostate cancer, the physician panel identified “multiple risk factors” for the worker, including smoking and family history. Although the physician panel also identified exposure to cadmium or other heavy metals as a possible risk factor, the physician panel found that the medical surveillance data on the worker did not support significant cadmium or other heavy metal exposure.

The OWA accepted the physician panel’s determination. *See* June 16, 2003 Physician Panel Case Review and July 9, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers’ compensation benefits.

In her appeal, the applicant contends that the physician panel determination is wrong. The applicant states that she believes that there is a direct link between the applicant’s death and exposures at a DOE facility. She states that the worker suddenly became allergic to gold jewelry and that whatever caused that allergy “may very well” have accelerated his prostate cancer.

II. Analysis

As an initial matter, we question whether the claim of a gold allergy would have affected the physician panel determination. The panel listed the risk factors for prostate cancer, and the only toxic substances on that list were “heavy metals, e.g. cadmium.” The panel specifically found that the medical surveillance records for the worker indicated insufficient exposures to those substances to aggravate, contribute, or cause prostate cancer. Furthermore, the panel specifically found that the worker had multiple risk factors for prostate cancer, including smoking and family history. Thus, for the gold allergy claim to have affected the determination, the panel would have had to consider (i) the applicant’s claim that the worker had a gold allergy, (ii) whether the gold allergy was attributable to heavy metal exposure, (iii) whether the gold allergy indicated a greater level of heavy metal exposure than previously considered, and (iv) whether that greater amount, in the presence of the worker’s other risk factors, was a significant factor in aggravating, contributing, or causing

the worker's prostate cancer. Accordingly, the impact that a gold allergy claim would have had on the physician panel is speculative.

In any event, the applicant's claim of a gold allergy does not indicate any deficiency or error in the physician panel determination. The physician panel is required to review all of the records provided and to address certain matters in its determination. 10 C.F.R. §§ 852.9, 852.12. This the panel did. The application did not claim the existence of a gold allergy, and we could not find any reference to a gold allergy in the worker's medical records. Because the application and supporting documents did not mention the gold allergy, the panel could not have considered it, let alone had any reason to address it in its determination.

Because the applicant has not identified a deficiency or error in the physician panel determination, there is no basis for an order remanding the matter to OWA for a second panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0028 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 21, 2003

